IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 634 of 2002

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA
HONOURABLE MR.JUSTICE K.A.PUJ

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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JITUBHAI MULJIBHAI - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
THROUGH JAIL for Appellant(s) : 1,MR NK MAJMUDAR for Appellant(s) : 1, Appointed by Legal Aid Committee
MR. K.T.DAVE, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 18.12.2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.M.KAPADIA)

1. Appellant – Jitubhai Muljibhai Raval ("the accused" for short) was charged and tried by the learned Additional Sessions Judge, Court no.7, Ahmedabad City in Sessions Case no. 49 of 2002, for commission of the offences punishable under Section 397 and under Section 398 read with Section 114 of the Indian Penal Code ("IPC" for short), on the accusation that he along with Ramanbhai Sathwara has committed an attempt to commit robbery, armed with deadly weapon – Dagger and caused injuries to the witness Purshottambhai Jivrajbhai. At the end of the trial, as the accused was found guilty of the offences with which he was charged, he was convicted vide judgement and order dated 8.7.2002 for commission of the offences punishable under Section 397 read with Section 114 IPC and under Section 398 read with Section 114 IPC, and was sentenced to suffer RI for 10 years and fine of Rs.500/- and in default of payment of fine to undergo RI for 1 month for the offences punishable under Section 397 read with Section 114 IPC, and RI for 10 years and fine of Rs.500/- and in default of payment of fine to undergo RI for 1 month, for the offences punishable under Section 398 read with Section 114 IPC.

2. The accused, aggrieved by the impugned judgment and order of conviction and sentence, has filed Criminal Appeal No. 634 of 2002 with the aid of Section 374 of the Code of Criminal Procedure, 1973 ('the Code' for short).

3. The prosecution case as disclosed from FIR and unfolded during trial is as under.

3.1 On 28.9.2001, PW-1 – Trikambhai Jamnadas Patel, resident of Vrajvihar Society, Opp. Chirag Diamond, Shastri Road, Bapunagar, Ahmedabad City, came out of his house and was about to go to place of his business. At that time, he saw Patel Parshottambhai Jivrajbhai passing with a bag on his shoulder near the main gate of the society at about 9 0' clock for going to his factory. At that time two persons intercepted him and asked Parshottambhai Jivrajbhai Patel to hand over the bag to them, but Parshottambhai refused to give them the said bag. One of the two persons attacked Parshottambhai Jivrajbhai Patel with dagger. Parshottambhai caught hold the dagger with his left hand. At that time, he along with Maganbhai Agarwal, Jamnadas Patel and Ashokbhai Patel and other persons of the society reached the scene of offence. The person with dagger threw chilly powder on them. They caught him with dagger and packet of chilly powder. The other person ran away on his Hero-Honda motorcycle. They, then asked the person, whom they caught, his name. He stated that he is

Jeetubhai Muljibuai Raval residing at Barvala Raval Sheri, Taluka Dhandhuka, District Ahmedabad. They also asked him the name and address of the other person who ran away on Hero-Honda. He stated that the other person is Ramanbhai Sathwara, residing at Viratnagar. As Parshottambhai has received injuries on his left hand palm with dagger, he was taken to Dhanvantari Hospital for treatment. The said incident was then informed to the Police control. Jitubhai Muljibhai Raval was handed over to the police with dagger and chilly powder. As per the case of prsecution, Jeetubhai and Ramanbhai Sathwara were seen near the main gate of the society before two days.

3.2 Sum and substance of the prosecution case is that Parshottambhai Jivrajbhai Patel, residing in the society, was stopped on the main gate of the society at about 9 0' clock in the morning and the aforesaid two persons demanded the bag. On refusing to give the said bag, he was attacked with a dagger for snatching the bag, but he caught hold the dagger with his left hand. The other persons of the society rushed towards the place of incident during the scuffle. At that time, the accused tried to run away by throwing chilly power on them. A person viz. Jeetubhai was caught on the spot and Ramanbhai Sathwari ran away on his motorcycle.

3.3 The aforesaid incident was conveyed to PW-9

Senior Police Inspector, Bapunagar, Ahmedabad. As he received the said message on the way, he immediately rushed to Vrajvihar Society in Government Jeep. He, thereafter inquired and before him PW-1 Trikambhai Jamnadas Patel lodged a complaint against the accused. Senior PI dictated the said complaint to writer – Amrutlal and thereafter it was sent to Bapunagar Police Station for registering the offence against the accused.

3.4 He, thereafter, prepared a police yadi for sending the injured Parshottam Jivrajbhai Patel to hospital for treatment and also recorded his statement. He, thereafter, drawn the panchnama of the scene of offence with the help of two panchas. He recovered the dagger used by the accused for commission of the offence. He also searched the person of the accused in the presence of the panchas and recovered dry chili powder from his clothes. He, thereafter, obtained certificate from Dhanvantri Hospital, indicating injuries caused to the victim. He also took NC complaint of the accused as the accused complained that he was beaten by the complainant in the said incident. At the end of the investigation, since sufficient incriminating evidence was found against the accused, he filed charge sheet against the accused for the offences punishable under Section 397 and Section 398 read with Section

114 IPC in the Court of learned Metropolitan Magistrate, Ahmedabad.

3.5 As the offences punishable under Section 397 and Section 398 read with Section 114 IPC are exclusively triable by a Court of Sessions, the learned Metropolitan Magistrate, committed the case to the City Sessions Court, Ahmedabad.

3.6 The learned Additional Sessions Judge, Ahmedabad City, to whom the case was made over for trial, framed charge against the accused. The accused pleaded not guilty to the charge and claimed to be tried. Thereupon he was put to trial and tried by the learned Additional Sessions Judge, City Sessions Court, Ahmedabad, in Sessions Case No.49 of 2002.

3.7 To prove the culpability of the accused, the prosecution has examined as many as 9 witnesses and relied upon their oral testimony, details of which have been given in paragraph 2 of the impugned judgment and order. They are as under:

PW No.	Name	Ex.No.	Page No.
1	Trikambhai Jamnadas Patel	7	19
2	Mukeshbhai Ravjibhai Patel	9	25
3	Parshottambhai Jivrajbhai Patel	11	29
4	Ashokbhai Parshottambhai Patel	12	33
5	Mohanbhai Manjibhai Patel	13	37
6	Fulchandbhai Manjibhai Patel	15	41

PW No.	Name	Ex.No.	Page No.
7	Upendrabhai Vrajlal Rawal	17	45
8	Ishwarlal Shatapan Patil	19	47
9	Virsinhbhai Shivabhai Katara	22	53

3.8 To prove the charge leveled against the accused, the prosecution has also produced number of documents and relied upon the contents of the same, details of which have been given in second part of para 2 of the impugned judgment and oder.

3.9 After recording of the evidence of the prosecution witnesses was over, the trial court explained to the accused the circumstances appearing against him in the evidence of the prosecution witnesses and recorded his further statement under Section 313 of the Code. In his further statement the accused denied the case of the prosecution in toto and stated that he was arrested on his way. He has not committed any theft nor attempt to commit any theft, nor he has beaten the victim Parshottam Jivrajbhai Patel. He has been roped in a false case of robbery and attempt to cause grievous hurt.

3.10 On appreciation, evaluation, analysis and scrutiny of the evidence on record, the trial Court has held that the accused along with Ramanbhai Sathwara came at the scene of offence on Hero-Honda motorcycle and intercepted

Parshottam Jivrajbhai Patel for snatching away his handbag. As Parshottam Jivrajbhai Patel resisted, the accused tried to cause injury to him with a dagger and was caught red handed by the complainant as well as other witnesses. Therefore, complicity of the accused in commission of the offence has been duly proved. The trial Court, therefore, convicted the accused for the offences punishable under Section 397 read with Section 114 IPC as well as Section 398 read with Section 114 IPC, and sentenced him to suffer RI, to which the reference is made in earlier paragraph of this judgment. It is this judgement and order which is now on anvil of scrutiny of this Court in this Appeal, filed at the instance of the accused.

4. Mr. N.K.Majmudar, learned advocate who is appointed by the legal aid committee to assist the accused, has contended that even if the evidence of the prosecution witnesses is accepted as a whole, then conviction under Section 397 read with Section 114 IPC and Section 398 read with Section 114 IPC cannot be made out as the offence of robbery as well as causing grievous hurt has not been concluded. It was merely an attempt to commit robbery and to cause grievous hurt. Therefore, at the most, the accused can be convicted of the offences punishable under Section 397 read with Section 511 IPC and Section 398 read with Section 511

IPC, for which the sentence is extended to one half of the longest term of imprisonment provided for the offence. He, therefore, urged that the impugned judgment and order, recording conviction under Section 397 read with Section 114 and Section 398 read with Section 114 IPC deserves to be quashed and set aside by modifying the same as the conviction under Section 397 read with Section 511 and Section 398 read with Section 511 of IPC and the accused may be sentenced accordingly. As the accused is languishing in jail from 28.9.2001, that is, the date of filing the FIR, he has almost undergone imprisonment for more than 5 years, therefore, sentence undergone by him may be treated as substantive sentence and accordingly the appeal may be allowed qua conviction as well as sentence. He, therefore, urged to allow the appeal by modifying the conviction and sentence.

5. Mr. K.T.Dave, leaned APP for the respondent – State of Gujarat has fairly submitted that, it is true that the offence of robbery and causing grievous hurt has not been concluded. It is merely an attempt to commit robbery as well as grievous hurt with deadly weapon – dagger, and therefore the accused ought to have been charged for the offences punishable under Section 397 read with Section 511 IPC as well as Section 398 read with Section 511 IPC, therefore, the impugned judgement and order convicting the accused under Section 397 read with Section 114

IPC and Section 398 read with Section 114 IPC deserves to be quashed and set aside by modifying the order of conviction as conviction under Section 397 read with Section 511 IPC as well as under Section 398 read with Section 511 IPC, and, therefore, at the most he can be awarded sentence of RI for 5 years for both the offences separately. He, therefore, urged to pass appropriate order by suitably modifying the order of conviction and sentence.

6. We have considered the submissions advanced by Mr. N.K.Majmudar, learned advocate of the accused and Mr. K.T.Dave, learned APP for the respondent - State of Gujarat. We have also perused the impugned judgment and order. We have also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case.

7. After threadbare examination of the evidence of the prosecution witnesses, on reappreciation, reanalysis, reevaluation, close scrutiny of the evidence, the undisputed facts which have come on record in the form of evidence, the salient features of the prosecution case, are now as under:-

(i) The alleged incident took place at 9 0' clock on 28.9.2001 at the main gate of Vrajvihar Society, Opp. Chirag Diamond, Shastri Road,

Bapunagar, Ahmedabad.

(ii) PW-1 – Trikambhai Jamnadas Patel was going to his place of business at 9 0' clock in the morning.

(iii) He saw the victim – Parshottam Jivrajbhai Patel lifting a bag on his shoulder while going to his workshop.

(iv) Parshottam Jivrajbhai Patel was intercepted by two persons and both persons asked to hand over the said bag to them.

(v) Parshottam Jivrajbhai Patel refused to hand over the said bag, therefore, one of the two persons, assaulted Parshottam Jivrajbhai Patel with dagger which was caught hold by Parshottam Jamnadasbhbai Patel with his left hand.

(vi) At that time PW-1 Trikambhai Jamnadas Patel, Maganbhai Agarwal, Jamnadas Patel, Ashokbhai Patel, and occupants of the society, reached at the place of incident. At that time one of the two persons who was having dagger with him, threw chilli powder on them. They then over powered the person who was having dagger and having chili powder and caught hold of him.

(vii) During that time another person named Ramanbhai Sathwara ran away on his motorcycle – Hero Honda.

(viii) During inquiry from the accused, he gave his name Jitubhai Muljibhai Rawal, residing at Barvala Raval Sheri, Taluka Dhandhuka, District Ahmedabad. He also gave the name of another person as Ramanbhai Sathwara, residing at Viratnagar, who ran away on Motorcycle.

(ix) There is no dispute that the accused no.1 could not rob the hand bag carried by the victim Parshottambhai Jivrajbhai Patel. However the victim Parshottambhai Jivrajbuai Patel has received injuries in his left hand as he caught hold the dagger with his left hand when the accused tried to inflict blow with it and received simple injuries.

8. Mr. N.K.Majmudar, learned advocate of the appellant could not dislodge the aforesaid evidence adduced by the prosecution. Therefore, the alleged incident did take place.

9. In light of the aforesaid undisputed facts, the question which calls for determination of this Court in this appeal is as to whether the prosecution has successfully established that the accused has committed offence punishable under Section 397 read with Section 114 IPC as well as Section 398 read with Section 114 IPC. It is true that the accused along with Ramanbhai Sathwara has come on motorcycle. Therefore, both of them have abetted each other in committing crime. Since the second person ran away and the police could not trace him out till today, he

has been shown as absconding accused in the charge sheet. Notwithstanding the aforesaid fact, there is no dispute that the offence of robbery has not been concluded as the accused could not forcibly take away the bag from Parshottambhai. It is merely an attempt to commit robbery. So far as attempt to grievous hurt is concerned, it is also not concluded. Victim Parshottambhai Jivrajbhai Patel received simple injury on his left hand while holding the dagger. It is not the case of the prosecution that the victim received grievous hurt. The victim was given treatment as indoor patient from 28.9.2001 to 30.9.2001 in Dhanvantri Hospital. In that connection certificate issued by Dr. Kukesh Patel is at exh. 10. On a perusal of the said certificate it is seen that he has received CLW with knife on left hand. Therefore, injuries caused to the victim are simple hurt.

10. In view of the aforesaid evidence, according to this Court, conviction recorded under Section 397 read with Section 114 IPC as well as Section 398 read with Section 114 IPC against the accused does not stand to scrutiny of this Court as it is merely an attempt to commit robbery and attempt to inflict grievous hurt and in doing so simple hurt has been caused. Therefore, according to us, the accused is required to be convicted under Section 397 read with Section 511 IPC and Section 398 read with Section 511 IPC.

11. A similar question arose before the Hon'ble Supreme Court in the case of Sukhwinder Singh v. State of Punjab, AIR 1994 SC 764. In paragraph 5 of the said judgment, the Hon'ble Supreme Court has observed as under;

"5. Coming to the question of sentence we find that ultimately neither of the two witnesses were injured nor the appellant succeeded in taking any money from them. No doubt the demand made by them is an offence in the eye of law and attract the provisions of law with which they are charged. An offence u/S. 397 simpliciter is not made out and as the learned counsel rightly pointed out it would be only one punishable u/S. 397 read with S.511, IPC. We are also of the view that u/S.3 of TADA Act the sentence of 10 years is uncalled for and a minimum sentence of 5 years would meet the ends of justice."

12. The principle enunciated by the Hon'ble Supreme Court in above referred to judgement is squarely applicable to the facts of the instant case. In the instant case also the demand was made by the accused from the victim to hand over the bag, and on refusing to hand over the bag to the accused, the accused tried to inflict injury with dagger, which was caught hold by the accused with his left hand and in doing so, the left hand of the victim was injured, and, therefore, he has been given treatment. Therefore, the offence punishable under Section

397 read with Section 114 IPC and Section 398 read with Section 114 IPC is not established but an attempt to commit robbery and an attempt to grievous hurt was made, which is punishable under Section 397 read with Section 511 IPC as well as Section 398 read with Section 511 IPC. Therefore, the accused is required to be held guilty of the offences punishable under Section 397 read with Section 511 IPC and Section 398 read with Section 511 IPC instead of Section 397 read with Section 114 IPC and Section 398 read with Section 114 IPC, and accordingly, the accused can be convicted for commission of the offences punishable under Section 397 read with Section 511 IPC as well as Section 398 read with Section 511 IPC simpliciter.

13. When the principal offence is read with Section 511 is concerned, the accused can be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life, or, as the case may be, one-half of the longest term of imprisonment provided for that offence, or with such fine as is provided for the offence, or with both. In the instant case, so far as punishment under Section 397 as well as Section 398 IPC is concerned, the accused can be punished to suffer RI which shall not be less than 7 years. But, as observed earlier, the offence has not been concluded, therefore,

according to us, separate sentences of 5 years for commission of offences punishable under Section 397 read with Section 511 as well as Section 398 read with Section 511 IPC would serve the ends of justice.

14. For the foregoing reasons, the appeal succeeds in part and accordingly it is partly allowed. The order of conviction recorded against the accused for the offences punishable under Section 397 read with Section 114 IPC and Section 398 read with Section 114 IPC is quashed and set aside by modifying the same, and it is held that the accused is guilty of the offences punishable under Section 397 read with Section 511 IPC and Section 398 read with Section 511 IPC. We, accordingly, convict the accused for commission of the offenes punishable under Section 397 read with Section 511 IPC and Section 398 read with Section 511 IPC and reduce the sentence of RI for 10 years to RI for 5 years for both the offences, and, accordingly, the accused is sentenced to suffer RI for 5 years and fine of Rs.500/- and fine of Rs.500/- and in default of payment of fine, to undergo further RI of 1 month for the offences punishable under Section 397 read with Section 511 IPC, and also sentenced to suffer RI for 5 years and fine of Rs.500/- and in default of payment of fine, to undergo further RI for 1 month for the offence punishable under Section

398 read with Section 511 IPC.

15. Both the sentences are directed to run concurrently.

16. Appeal is disposed of to the extent as indicated above.

(A.M.Kapadia,J)

(K.A.Puj,J)

Jayanti*